98-10002

Supreme Court, U.S.
FILED
JUN 5 1999
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1998

No. _____

GARY GRAHAM, now known as
SHAKA SANKOFA,

Petitioner,

v.

GARY JOHNSON, Director,
Texas Department of Criminal Justice,
Institutional Division,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

Petitioner, Gary Graham, now known as Shaka Sankofa, respectfully requests that the Court permit him to proceed *in forma pauperis* on his Petition for Writ of Certiorari to the United States Court of Appeal for the Fifth Circuit, to which this motion is attached.

Mr. Sankofa is now and has always been eligible to proceed in the federal courts as a pauper. In the most recent proceedings in the United States Court of Appeals for the Fifth Circuit and in the United States District Court for the Southern District of Texas, counsel were

48 pp

appointed for Mr. Sankofa in both courts pursuant to 21 U.S.C. § 848(q)(4)(B) (requiring appointment of counsel in capital federal habeas corpus proceedings for a person "financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services").

WHEREFORE, petitioner respectfully requests that the Court grant leave for him to proceed *in forma pauperis*.

Respectfully submitted,

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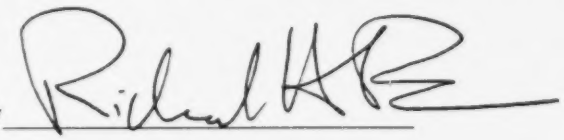
By 

Counsel for Petitioner

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(9)

CAPITAL CASE

QUESTIONS PRESENTED

*In a capital case where a successive federal habeas petition was filed making a substantial showing that ineffective assistance of trial counsel resulted in the conviction and condemnation of a man who is actually innocent, where the case was pending in the United States Court of Appeals at the time of enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), and where, **after** AEDPA was enacted, the Court of Appeals dismissed it* sua sponte, ***without prejudice**, for further exhaustion of state remedies:*

1. Did the Court of Appeals in 1999 err by holding that the refiling of the pre-AEDPA petition after re-exhaustion of state remedies constituted a new habeas application to which AEDPA applied, and by disregarding the teaching of *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998), by finding in that opinion "no indication that the . . . [refiled] application should be treated as a continuation of the first so as to preclude the application of AEDPA" (168 F.3d at 777)?

2. Did the Court of Appeals err by holding that Congress intended AEDPA's amendments to 28 U.S.C. § 2244(b) to apply to cases in which a habeas petition was filed before AEDPA and refiled (following exhaustion) after AEDPA, and by disregarding (a) the requirement of *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), that Congress express such an intent unambiguously, and (b) conflicting decisions by the Third, Sixth, and D.C. Circuits that Congress did not express such an intent?

3. Did the Court of Appeals err by holding that the application of AEDPA to bar the refiling of a pre-AEDPA successive petition which was entitled to be heard on the merits when it

was filed originally (since it made a showing of actual innocence and ineffective assistance) was not impermissibly retroactive because retroactivity requires a showing of "reasonable detrimental reliance," when such a holding conflicts with (a) the standard for retroactivity established by *Landgraf*'s "default rule" analysis (*viz.*, the attachment of new legal consequences to pre-enactment events), (b) the holdings of the Third, Sixth, and D.C. Circuits that *Landgraf* controls in such circumstances; and (c) the teaching of *Lonchar v. Thomas*, 517 U.S. 314 (1996), that the respective responsibilities of habeas petitioners and courts are measured by the body of clearly established exhaustion and successive-petition rules and are not to be constructed *ad hoc*?

4. Did the Court of Appeals err by refusing to recall its 1996 mandate in the belief that *Calderon v. Thompson*, 523 U.S. 538 (1998), categorically forbids the post-AEDPA recall of any pre-AEDPA habeas mandate at a petitioner's instance, even to prevent the retroactive frustration of the mandate's purpose and to prevent a miscarriage of justice?

5. Did the Court of Appeals' refusal to recall its mandate under these circumstances constitute a denial of due process because it deprives petitioner of any remedy for a fatal miscarriage of justice, solely through delays in the adjudication of his valid federal habeas corpus claims that were not due to any untimeliness or fault on his part?

PARTIES TO THE PROCEEDINGS IN THE LOWER COURTS

The caption of the case contains the names of all parties to the proceedings in the lower courts and here.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS IN THE LOWER COURTS ii

TABLE OF AUTHORITIES v

CITATION TO THE OPINIONS BELOW 1

STATEMENT OF THE BASIS FOR JURISDICTION 1

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 1

STATEMENT OF THE CASE 1

A. Procedural History 2

B. Material Facts 6

REASONS FOR GRANTING THE WRIT 11

1. The Fifth Circuit's holding that the refiling of Mr. Sankofa's pre-AEDPA petition amounted to the filing of a new federal habeas proceeding, to which AEDPA applies, flouts this Court's reasoning in *Stewart v. Martinez-Villareal*. 16

2. Even if Mr. Sankofa's refiling of his 1993 petition in 1998 amounted to the filing of a post-AEDPA petition, the Fifth Circuit's determination that Congress intended the new § 2244(b) provisions to apply to such a petition (a) disregards the requirement that Congress express such an intent unambiguously, and (b) conflicts with the decisions of the Third, Sixth, and D.C. Circuits on this same important matter. 22

3. (A) The Fifth Circuit's conclusion that applying AEDPA's § 2244(b) has no retroactive effect in the absence of "reasonable detrimental reliance" conflicts with *Landgraf*'s quite different test for retroactive effects and with decisions of the Third, Sixth, and D.C. Circuits finding retroactive effects under *Landgraf* in cases like Mr. Sankofa's without requiring "detrimental reliance." 25

(B) Even if "reasonable detrimental reliance" were required, the Fifth Circuit's conclusion that Mr. Sankofa has not shown such reliance departs so far from settled principles of pre-AEDPA law as to call for the exercise of this Court's supervisory powers under *Lonchar v. Thomas*, 517 U.S. 314 (1996). 25

A. The Fifth Circuit's adoption of a "reasonable detrimental reliance" test for measuring retroactive effects 25

B. The Fifth Circuit's application of the "reasonable detrimental reliance" test to Mr. Sankofa's case 32

4. Having decided that AEDPA terminally barred Mr. Sankofa's 1998 petition, the Fifth Circuit wrongly refused to recall its mandate in Mr. Sankofa's 1993 habeas proceedings to avoid a miscarriage of justice; and it misread *Calderon v. Thompson*, 523 U.S. 538 (1998), as requiring the courts of appeals to treat every post-AEDPA motion by a habeas petitioner to recall a pre-AEDPA mandate as a second or successive petition for purposes of § 2244(b). 35

5. The Fifth Circuit's failure to recall its mandate in the circumstances of Mr. Sankofa's case deprived him of due process because it extinguished his right to an adjudication of the merits of his claims of ineffective assistance and actual innocence although he has done nothing to warrant their eradication. 39

CONCLUSION 40

TABLE OF AUTHORITIES

Federal Cases

Alexander v. United States, 121 F.3d 312 (7th Cir. 1997) 26

Brown v. Estelle, 701 F.2d 494 (5th Cir. 1983) 32

Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798) 27

Calderon v. Thompson, 523 U.S. 538 (1998) 16,35,36,37,38

In re Davenport, 147 F.3d 605 (7th Cir. 1998) 29

Felker v. Turpin, 518 U.S. 651 (1996) 23,24,40

Ford v. Wainwright, 477 U.S. 399 (1986) 17

Graham v. Collins, 829 F. Supp. 204 (S.D.Tex. 1993) 4,12

Graham v. Johnson, ___ F.Supp.2d ___, 1999 WL 216101 (S.D.Tex.) 1,6

Graham v. Johnson, 94 F.3d 958 (5th Cir. 1996) 4,5,37

Graham v. Johnson, 168 F.3d 762 (5th Cir. 1999) ..... *passim*

Granberry v. Greer, 481 U.S. 129 (1987) 4

In re Hanserd, 123 F.3d 922 (6th Cir. 1997) 20,24,29,30

Hart v. Estelle, 634 F.2d 987 (5th Cir. 1981) 32

Joyner v. King, 786 F.2d 1317 (5th Cir. 1986) 32

Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992) 33

Kuhlmann v. Wilson, 477 U.S. 436 (1986)] 12

Landgraf v. USI Film Products, 511 U.S. 244 (1994) 14,22,24,27,28,30

Lindh v. Murphy, 521 U.S. 320 (1997) 14,19,20,22,23

Logan v Zimmerman Brush Co., 455 U.S. 422 (1982) 39,40

Lonchar v. Thomas, 517 U.S. 314 (1996) 15,25,34,35

In re Magwood, 113 F.3d 1544 (11th Cir. 1997) 26

McCleskey v. Zant, 499 U.S. 467 (1991) 11,27

McFarland v. Scott, 512 U.S. 849 (1994) 31

In re Minarik, 166 F.3d 591 (3d Cir.1999) 24,29,30

Pratt v. United States, 129 F.3d 54 (1st Cir. 1997) 26

Rose v. Lundy, 455 U.S. 509 (1982) 16

Schlup v. Delo, 513 U.S. 298 (1995) 7,11,31,40

Societe Internationale v. Rogers, 357 U.S. 197 (1958) 39

Stewart v. Martinez-Villareal, 523 U.S. 637, 118 S. Ct. 1618 (1998) 14,16,17,18,19,20

Strickler v. Greene, No. 98-5864, ___ U.S. ___ (June 17, 1999) 34

United States v. Ortiz, 136 F.3d 161 (D.C.Cir.1998) 24,29,30

Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976) 28

Vasquez v. Hillery, 474 U.S. 254 (1986) 32

State Cases

Ex parte Graham, 853 S.W.2d 564 (Tex.Crim.App. 1993) 3

Ex parte Graham, 853 S.W.2d 565 (Tex.Crim.App. 1993) 3

Docketed Cases

Ex parte Graham, No. 17,568-05 (November 18, 1998) 5

Federal Statutes

28 U.S.C. § 1254(1) 1

28 U.S.C. §§ 2241-2255 19

28 U.S.C. § 2244(b) ..... *passim*

28 U.S.C. § 2244(b)(1) 13

28 U.S.C. § 2244(b)(2) 13

28 U.S.C. § 2244(b)(3) 6,13

28 U.S.C. §2255 (second (1)) 29

28 U.S.C. §2255 (second (2)) 29

Rule 5, Rules Governing Section 2254 Cases in the United States District Courts 4

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Gary Graham, now known as Shaka Sankofa, respectfully requests that this Court grant certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit rendered on February 25, 1999. In support of his request, Mr. Sankofa sets forth the following:

CITATION TO THE OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is *Graham v. Johnson*, 168 F.3d 762 (5th Cir. 1999), reproduced in Appendix 1 hereto. The opinion of the United States District Court for the Southern District of Texas which was appealed to the Fifth Circuit is *Graham v. Johnson*, ___ F.Supp.2d ___, 1999 WL 216101 (S.D.Tex.), in Appendix 2.

STATEMENT OF THE BASIS FOR JURISDICTION

The opinion of the Fifth Circuit affirming the judgment of the District court was entered on February 25, 1999 and revised February 26, 1999. A timely suggestion for rehearing en banc was filed, was treated by the Fifth Circuit as a petition for rehearing, and was denied March 23, 1999. *See* Appendix 3. This Court's jurisdiction is conferred by 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional and statutory provisions involved are set out in Appendix 4.

STATEMENT OF THE CASE

This is, at its core, a case about a person who was convicted of a murder in which he had no part and was sentenced to death because his lawyer failed to bring out the facts showing mistaken identity. These facts emerged after years, and when he asserted his lawyer's

ineffectiveness for the second time, in a 1993 federal habeas petition, the district court assumed that he was entitled to pursue his claim through a successive petition, inasmuch as he was probably innocent But it denied relief on the merits without an evidentiary hearing; and on appeal the Fifth Circuit, finding the factual record insufficiently developed and believing that a state evidentiary forum might have become available to hear the case, *sua sponte* remanded and ordered a dismissal without prejudice for further exhaustion. This ruling was made four months after AEDPA was enacted. Following fruitless exhaustion, the condemned man returned to the federal courts, and this time the Fifth Circuit ruled that the successive-petition provisions of AEDPA applied and barred relief without regard to innocence. This petition challenges the ruling that a person who was entitled to a hearing under pre-AEDPA law to demonstrate his lawyer's ineffectiveness and his own actual innocence has been retroactively deprived of that right by AEDPA. These are the details:

A. Procedural History

Shaka Sankofa, then Gary Graham, was convicted of capital murder and sentenced to death on May 13, 1981, in Harris County, Texas. His conviction and sentence were affirmed, and his first state and federal habeas applications were ultimately unsuccessful. *See Graham v. Johnson*, 168 F.3d 762, 764-767 (5th Cir. 1999) (Appendix 1) (recounting procedural history).

Mr. Sankofa commenced his second state habeas proceeding on April 20, 1993. His primary claim was that he is innocent and that his trial lawyer's ineffective assistance in failing to investigate his case led to his mistaken conviction. He also claimed that, because he was innocent, his execution would violate the Eighth and Fourteenth Amendments. In support, he showed that his lawyer inexplicably failed to interview five known and available crime-scene

witnesses, each of whom would have exonerated Mr. Sankofa if counsel had spoken with them. He demonstrated that a reasonable jury presented with these witnesses' testimony could not have found him guilty beyond a reasonable doubt because the only evidence connecting him to the crime – the testimony of a single crime-scene witness who, after an extremely suggestive police identification procedure, identified Mr. Sankofa as the assailant – could not have overcome the substantial doubt of his guilt.

As the state habeas court was denying relief on April 26, 1993, Mr. Sankofa finally gained access to the prosecutor's file.[1] A police report in the file led him to (a) two more crime-scene witnesses who exonerated him but who had not testified at trial (bringing the total to seven), (b) additional evidence corroborating the accounts of the exculpatory crime-scene witnesses, and (c) lab reports, not presented at trial, which excluded his gun as the murder weapon.[2] The police report had not been seen by anyone representing Mr. Sankofa since his trial counsel saw it before trial.

Mr. Sankofa filed his second federal habeas petition on April 28, 1993, but dismissed it voluntarily the same day following the issuance of a thirty-day reprieve by then-Governor Ann

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[1]The Court of Criminal Appeals adopted the trial court's recommendation to deny the habeas petition one day later, on April 27, 1993, *Ex parte Graham*, 853 S.W.2d 564 (Tex.Crim.App. 1993), notwithstanding Mr. Sankofa's plea to stay the case because of the newly-available prosecution file.

[2]After this new evidence was discovered, Mr. Sankofa filed in the Texas Court of Criminal Appeals a Motion to Continue the Stay of Execution and for Remand for Evidentiary Hearing on Claim of Ineffective Assistance of Counsel, in which he set forth the newly discovered evidence supporting the claims made in his second (April 20, 1993) state habeas petition. The Court of Criminal Appeals denied the motion without prejudice to presenting a new state habeas application in the trial court. *Ex parte Graham*, 853 S.W.2d 565, 570-571 (Tex.Crim.App. 1993).

Richards. Following investigation of the evidence revealed for the first time by the disclosure of the prosecutor's file on April 26, 1993, Mr. Sankofa refiled his second federal habeas petition on July 22, 1993, without returning to the state courts to present the new facts found through the prosecutor's file.[3] He did so believing that it was appropriate to take the issues expeditiously to federal court – a position with which the State agreed by failing to invoke nonexhaustion in its answer, as it was legally required to do if it meant to invoke exhaustion at all, *see* Rule 5 of the Rules Governing Section 2254 Cases in the United States District Courts, and *Granberry v. Greer*, 481 U.S. 129, 134 & n.5 (1987), and by **affirmatively waiving exhaustion** as permitted under *Granberry*. The District court denied relief on the merits without any evidentiary hearing on August 13, 1993. *Graham v. Collins*, 829 F.Supp. 204 (S.D.Tex. 1993).

Three years later, following oral argument on appeal, the Fifth Circuit ruled *sua sponte* – although no exhaustion issue had ever been raised by the State or by the court, or briefed by the parties – that Mr. Sankofa's case needed further state-court review. The Fifth Circuit therefore ordered that Mr. Sankofa's petition be dismissed, **specifying that its dismissal was "without prejudice."** *Graham v. Johnson*, 94 F.3d 958, 970-971 (5th Cir. 1996).[4] Central to the Fifth Circuit's decision to reject the conclusion of both parties that additional state-court proceedings

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[3]The Fifth Circuit refers to the petition filed on July 22, 1993, as the "third" federal habeas petition filed by Mr. Graham. 168 F.3d at 770. Mr. Sankofa has always referred to it as his "second" federal petition, because he dismissed what was numerically his second petition voluntarily on the same day it was filed, April 28, 1993, in order to investigate the additional evidence in support of his claims that the discovery of the prosecutor's file on April 26 permitted. The petition filed July 22, 1993, was only the second petition ruled on by the District court. Accordingly, it properly is his "second" federal habeas petition.

[4]Because of its relevance to the issues before the Court, Mr. Sankofa has included this opinion as Appendix 5.

were unnecessary was the fact that the "federal district court denied the petition without an evidentiary hearing" on "the many ... unresolved" factual issues in the case – despite Mr. Sankofa's request for an evidentiary hearing, *see* 94 F.3d at 965 – thus leaving the appellate court in doubt whether it could "review ... the underlying issues on a fully informed basis." *Id* at 971.

However, the Texas Court of Criminal Appeals summarily refused to permit the filing of another state habeas application and dismissed Mr. Sankofa's application as an abuse of the writ. *Ex parte Graham*, No. 17,568-05 (November 18, 1998) (Appendix 6 hereto). So, on December 18, 1998, Mr. Sankofa returned to the federal district court with a habeas petition setting out the same claims of ineffective assistance of counsel and actual innocence, on the basis of the same material facts, that were contained in the 1993 petition which the Fifth Circuit had ordered dismissed without prejudice.[5] Mr. Sankofa argued that AEDPA's amendments to § 2244(b) of the federal habeas statute (barring successive same-claim petitions) did not govern this petition because it was a continuation of the federal habeas petition he had filed before AEDPA in 1993, and because if AEDPA were applied to his case, it would be impermissibly retroactive, attaching new, preclusive effects to pre-AEDPA events occurring at the time of his initial 1988 petition and at the time of his second, 1993 petition. The District court held that AEDPA's amendments to § 2244(b) did apply, and accordingly dismissed Mr. Sankofa's petition on January 7, 1999.

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[5]The only allegations that were added to the 1998 petition as compared with the 1993 petition concerned (a) possible suspects other than Mr. Sankofa or other motives for the killing of the deceased, which were identified or alluded to in the police report that Mr. Sankofa finally obtained in 1993, and (b) the fact that people in the neighborhood who thought they saw the suspect there after the killing had never seen Mr. Sankofa in the neighborhood. These additional allegations were corroborative of the primary facts showing that Mr. Sankofa was innocent, *see* Statement of the Case, Section B, Material Facts, *infra*, and in no way changed the claims made in the 1993 petition.

Graham v. Johnson, ___ F.Supp.2d ___, 1999 WL 216101 (S.D.Tex.) (Appendix 2). The Fifth Circuit affirmed the district court's decision, denied Mr. Sankofa's request to file a successive petition under 28 U.S.C. § 2244(b)(3), and denied Mr. Sankofa's request to recall the court's own 1996 mandate disposing of his 1993 petition. *Graham v. Johnson*, 168 F.3d 762 (5th Cir. 1999) (Appendix 1). These are the decisions that Mr. Sankofa now respectfully asks this Court to review.

B. Material Facts

At about 9:30 p.m. on May 13, 1981, Bobby Grant Lambert purchased $20 worth of items at a Safeway grocery store in Houston, Texas, receiving change from a $100 bill. As Mr. Lambert, a white man, walked across the parking lot to his car, a young black man approached him from behind. After a brief confrontation which appeared to some witnesses to involve an attempt to rob Mr. Lambert, the black man shot Mr. Lambert and fled. Mr. Lambert had sixty $100 bills on his person; none was taken. The $70-plus change from Mr. Lambert's purchase was never found. At least eight people saw the shooting and/or saw the gunman as he fled from the scene.

At trial, the only evidence connecting Mr. Sankofa to the crime was the testimony of one eyewitness, Bernadine Skillern, who saw the killing at a distance of 30 to 40 feet from her car in the dimly lit parking lot. After a suggestive identification procedure (described at page [9] below), Ms. Skillern picked Mr. Sankofa out of a lineup. Mr. Sankofa, who was 17 years old at the time and lived nowhere near the Safeway store, was not a suspect until he was arrested a week after the Lambert killing for other robberies and assaults occurring in the intervening week, in different parts of Houston.

The facts in support of Mr. Sankofa's claims of ineffective assistance of counsel and innocence, which have been set forth in his habeas petitions since 1993, bear a remarkable resemblance to those in *Schlup v. Delo*, 513 U.S. 298 (1995), where a strong showing of probable mistaken identity began to emerge several years after a trial marked by defense counsel's failure to interview numerous eyewitnesses. As alleged in Mr. Sankofa's 1993 petition and its 1998 reprise, Mr. Sankofa's court-appointed lawyer, Ron Mock, undertook no investigation of Mr. Sankofa's consistent assertions of innocence, because he believed Mr. Sankofa was guilty. This belief was not based on any admission or other information he got from Mr. Sankofa concerning the murder, nor on any evidence connecting Mr. Sankofa to the murder, but solely on Mr. Sankofa's confessions that he had committed a number of unrelated robberies and assaults during a period shortly after the murder of Mr. Lambert. Having thus convinced himself of his client's guilt, Mr. Mock failed to interview or undertake any investigation of the witnesses at the scene of the Lambert murder, many of whom saw the assailant before and after Mr. Lambert's shooting – all but two of whom were mentioned in the police report to which Mr. Mock acknowledged he was given access prior to trial – and none of whom, other than Ms. Skillern, identified Mr. Sankofa. In addition, Mr. Mock failed to present to the jury substantial evidence, known to him, that Ms. Skillern's identification was the product of a suggestive identification process rather than her observations at the crime scene, and that the fatal bullet was not fired by a weapon associated with Mr. Sankofa.

Capsulized, the evidence Mr. Mock failed to present to the jury, and about which the jurors were entirely ignorant when they convicted Mr. Sankofa, was the following:

1. Mr. Sankofa was arrested with a .22 caliber pistol a week after the murder. Mr.

Lambert was killed with a .22 caliber pistol. The police firearms examiner determined that Mr. Sankofa's weapon **could not have fired the fatal bullet**. No other weapon was ever connected to Mr. Sankofa.

2. Another suspect in the Lambert murder had access to a .22 caliber pistol that was never found. The suspect's brother had used this pistol to commit another murder very close in time to the murder of Mr. Lambert. After comparing the bullet from that murder victim to the bullet that killed Mr. Lambert, the police firearms examiner concluded that "it is possible the bullets came from the same gun."

3. **Eight** crime-scene witnesses have been identified who saw the assailant the night of Mr. Lambert's murder. **Only one of them**, Bernadine Skillern, has ever identified Mr. Sankofa as the assailant. And, as the State conceded in its most recent brief in the Fifth Circuit, Ms. Skillern only had a frontal view of the assailant's face for two or three seconds, at night, from a distance of 30 to 40 feet. **None of the other witnesses** – Ronald Hubbard, Sherian Etuk, Leodis Wilkerson, Wilma Amos, Daniel Grady, Malcolm Stephens, and Lorna Stephens, some of whom had much better views of the assailant – **identified Mr. Sankofa** in a photo array, a live line-up, or in any other manner.

4. None of the crime-scene witnesses had ever seen Mr. Sankofa before in their lives. All are strangers to him to this day. They are all **neutral witnesses**, with no connection to Mr. Sankofa. Six of these witnesses were interviewed by the police within the first few days after the murder, and they are discussed in the police report.[6]

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[6]The State has consistently attacked the credibility of Ms. Etuk and Mr. Hubbard, among others. No judge has ever heard these witnesses testify or observed their demeanor. This is why

5. Bernadine Skillern assisted in the drawing of a composite of the assailant. Three other crime-scene witnesses – Ronald Hubbard, Sherian Etuk, and Leodis Wilkerson – remarked that the composite looked like the man they saw that night. Comparison of the composite and the booking photograph of Mr. Sankofa, Appendix 7, reveals that **Mr. Sankofa does not look like the person in the composite**. **The person in the composite has a noticeably thinner face than Mr. Sankofa, and markedly different eyebrows, nose, and lips**.

6. Bernadine Skillern described the assailant's distinguishing features as "no facial hair" and a "short compact afro." She was shown two photo arrays, each with five photographs. Mr. Sankofa appeared only in the second array. Of the ten photos, **only Mr. Sankofa had both of the distinguishing features of the assailant**. Among the ten photos, which were mug shots, **only Mr. Sankofa's photo was altered by the police, to black out the date of the arrest**.

7. Despite this highly suggestive presentation, calculated to single out Mr. Sankofa's photo, Ms. Skillern told the officer that "the photo of Gary Gram [sic] looked like the suspect she saw on the night of the offense **except the complexion of the suspect she saw was darker and his face was thinner**. She said she could not say that the man in the photo was the suspect from the photo." Petition for Writ of Habeas Corpus, at Appendix 17 (at 33) (quoting from the police report) (emphasis supplied), filed in the District court on December 18, 1998. Ms. Skillern's initial refusal to identify Mr. Sankofa as the person she saw kill Mr. Lambert was consistent with her composite of the suspect, a composite that other crime-scene witnesses agreed was accurate. The jury did not know that Ms. Skillern had declined to make a positive identification of Mr.

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it is essential that a hearing be held to permit an impartial judge to determine credibility.

Sankofa on the basis of the photo array because his face was not thin as she remembered, and as the composite showed the assailant's face to be. Trial counsel, Mr. Mock, did not even challenge her misleading testimony to the jury that she **had** identified Mr. Sankofa from the photo array – leaving the jury to conclude that she had made **two** positive identifications.

8. The day after she saw Mr. Sankofa in a photo array, Ms. Skillern saw Mr. Sankofa again in a live lineup. **He was the only person who had been in both a photo array and the lineup.** Not surprisingly, she picked out Mr. Sankofa. She candidly admitted to the police that she had seen him in the photo array the night before.

9. Ronald Hubbard viewed the same live lineup with Bernadine Skillern and **did not see in the lineup the person he recalled as Mr. Lambert's assailant**.[7]

10. Of the six living crime-scene witnesses other than Ms. Skillern,[8] **all describe the assailant as shorter than Bobby Lambert, who was 5'6". Mr. Sankofa was 5'9"**.[9]

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[7]The State has consistently asserted that Mr. Hubbard told the police after the lineup that "he did not see the shooter's face." Brief of Appellee (in the most recent 5th Circuit appeal), at 41. In fact, although Mr. Hubbard did not see the shooter's face at the moment of the shooting, he told the police in his initial interview that he had seen the suspect before and after the shooting and, for that reason, was able to provide a detailed description of the shooter, including his age, height, weight, hair style, facial hair, and clothes. He also agreed to do a composite drawing, although the police report does not indicate whether he ever did. Nevertheless, he was able to tell the police that the drawing which Ms. Skillern helped make was "a fair likeness" of the assailant he saw that night. Petition for Writ of Habeas Corpus (filed December 18, 1998), Appendix 17, at 24.

[8]Daniel Grady died after the trial and before he could be interviewed by habeas counsel for Mr. Sankofa.

[9]In addition to the foregoing facts, Mr. Sankofa also claimed, beginning with his first state and federal petitions in 1988, that Mr. Mock was ineffective for failing to investigate and adduce alibi witnesses. A hearing was held in state court, during which two of the five alibi witnesses, members of Mr. Sankofa's family, testified. The state judge found these witnesses not

Thus, uncontradicted facts that this Court must take to be true pending the hearing that has so far been denied to Mr. Sankofa reveal that Mr. Sankofa very probably did not commit the crime for which he was convicted. At the least, no properly informed juror could have found him guilty of the crime beyond a reasonable doubt.

REASONS FOR GRANTING THE WRIT

In his initial federal habeas petition in 1988, Mr. Sankofa alleged that his trial counsel gave him ineffective assistance in failing to investigate and adduce guilt-phase defenses. Not until 1993, however, did his habeas counsel for the first time gain access to a police report (shown to trial counsel before trial) that identified numerous crime-scene witnesses, never before interviewed by the defense, whose testimony exonerates Mr. Sankofa. So, as of April 1993, when Mr. Sankofa filed his second federal petition, his was the extremely rare case in which this Court's pre-AEDPA restrictions on successive petitions in *McCleskey v. Zant*, 499 U.S. 467, 494 (1991), and *Schlup v. Delo*, 513 U.S. 298 (1995), permitted a federal habeas court to adjudicate the petition because the constitutional violation he was seeking to relitigate "'probably'" (indeed, almost certainly) "resulted in the conviction of one who was **actually innocent**." *Id.* at 322, 324, 326-27 (emphasis supplied). *See McCleskey*, 499 U.S. at 494 ("probably has caused the conviction of one innocent of the crime").

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credible. In the wake of the newly found, more pervasive evidence of ineffectiveness of trial counsel that was uncovered in 1993 – concerned with the crime-scene witnesses' exoneration of Mr. Sankofa and the exclusion of Mr. Sankofa's pistol as the murder weapon – together with the discovery in 1993 of additional evidence corroborating the alibi witnesses' efforts to testify for Mr. Sankofa despite not being contacted by Mr. Mock, Mr. Sankofa has, since 1993, asked the courts to revisit the credibility of the alibi witnesses. As with all his requests to be heard, these have been denied by the state courts and federal district court.

Nonetheless, Mr. Sankofa was not permitted to relitigate his petition in 1993, even after the State expressly waived further exhaustion of the claims in that petition and requested a federal disposition, and though the district court assumed that the allegations in the petition, if credited, would satisfy the test of actual innocence. *Graham v. Collins*, 829 F.Supp. 204, 208 (S.D.Tex. 1993).[10] The district court reached the merits of Mr. Sankofa's claims but denied the evidentiary hearing that he requested; it summarily rejected Mr. Sankofa's showing that the state-court factfindings in his case failed to satisfy the conditions entitling them to federal deference; and it denied relief. In August 1996, the Fifth Circuit ruled *sua sponte* that instead of accepting the state's waiver of exhaustion, it would send the case back to the state courts for the hearing which the federal district court had refused to hold but which the Fifth Circuit concluded was necessary for a fully informed adjudication.

In 1998, after the state courts held that no state procedure was available to Mr. Sankofa to obtain the hearing contemplated by the Fifth Circuit, Mr. Sankofa refiled his 1993 federal petition. Again the district court and Fifth Circuit refused to hear the claims of actual innocence and ineffective assistance that brought his case within the *McCleskey/Schlup* authorization for

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[10]The district court explained, in reference to only a portion of the evidence of innocence,

> The affidavits of Sherian Etuk, Ronald Hubbard, Mervyn West, and Wilma Amos Antwine, if credited, would satisfy the *Kuhlmann* [*v. Wilson*, 477 U.S. 436, 452-454 (1986)] test. The state court has determined that two of these affidavits are not credible. Rather than defer to the state court's factual findings at this stage of the inquiry, the Court will assume arguendo that the evidence Graham has presented makes out a colorable showing of factual innocence. (829 F.Supp. at 208.)

determination of the merits of successive petitions. This time, the Fifth Circuit elected to apply the outright *ban* on same-claim successive petitions with which AEDPA's amended section 2244(b)(1) had replaced the *McCleskey/Schlup* rules for cases filed after April 24, 1996.[11] In doing so, the Fifth Circuit decided that Mr. Sankofa's **right**, as of the date he filed his 1993 petition, **to be heard** on his successive ineffective-assistance claim **because he was able to show that he was innocent**, had been taken away during the succeeding five years – through no action or inaction of his own – and replaced with an absolute ban on litigating the same claim that he made in his 1993 petition, **despite** his continuing ability to establish his innocence. To reach this terminal conclusion the court of appeals had to take five steps. Each of those steps was legally erroneous and each is the subject of one of the five Questions Presented to this Court:

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[11]One might argue that the facts supporting the ineffective-assistance claim in Mr. Sankofa's second, 1993 petition are so different from those in his first petition that he is litigating a "new" claim within § 2244(b)(2) as amended by AEDPA, not the "same" claim within § 2244(b)(1). Even if § 2244(b)(2)'s definition of a "new" claim – one "presented in a second or successive habeas corpus application . . . that was not presented in a prior application," (emphasis supplied) – were construed to cover the significantly expanded, but similar, claim Mr. Sankofa presented in his 1993 petition, the result would be the same. Section 2244(b)(2)(B) replaces the *McCleskey/Schlup* requirement of **either** cause and prejudice **or** actual innocence with a requirement of cause **and** innocence; and Mr. Sankofa cannot satisfy the new provision's "cause" requirement, though he can satisfy the preexisting rule's previously conclusive "actual innocence" requirement (as well as the current provision's partially sufficient "actual innocence" requirement). For this reason, Mr. Sankofa treats the ineffective-assistance claims in his first and second petitions as the same claim. (Because of the somewhat obscure way in which the Fifth Circuit opinion below describes a "concession" made by Mr. Sankofa, it is important to be clear that this is that concession. Mr. Sankofa conceded below and concedes here that *if* AEDPA applies to his 1998 petition, he cannot satisfy the requirements of amended § 2244(b). He conceded nothing more or less than this.) The basis for the Fifth Circuit's ruling, both on Mr. Sankofa's appeal from the district court's dismissal of the 1998 petition and on his request for authorization to file a successive petition under 28 U.S.C. § 2244(b)(3), was also the same – that AEDPA governed Mr. Sankofa's 1998 petition and that he was barred by § 2244(b)(1) and/or § 2244(b)(2) from prosecuting this petition.

First, the Court of appeals had to decide that the refiling in December 1998 (after further exhaustion) of Mr. Sankofa's 1993, **pre-AEDPA** successive petition, which the Fifth Circuit had ordered dismissed **without prejudice** (to permit further exhaustion) in August 1996, amounted to the filing of a **different**, **independent** successive petition -- a petition to which AEDPA applies because it was **not** filed before AEDPA (see *Lindh v. Murphy*, 521 U.S. 320 (1997)). To reach this conclusion, the Fifth Circuit had to reject the plain text of *Stewart v. Martinez-Villareal*, 523 U.S. 637, 118 S.Ct. 1618 (1998), which speaks to precisely this situation, in which "[t]here was only *one* application for habeas relief," namely, the **pre-AEDPA** application that first became "ripe" for adjudication after subsequent state proceedings. 118 S.Ct. at 1621 (emphasis supplied) . The Fifth Circuit took this step although the delay in adjudication of Mr. Sankofa's pre-AEDPA application for habeas relief was not his doing – since the State itself had agreed with him, by expressly waiving exhaustion at the time of the 1993 petition, that all remaining proceedings could and should appropriately occur in federal court – but was the result of the Fifth Circuit's own preference to return the case yet again to the state courts. Moreover, the crucial predicate for the Fifth Circuit's *sua sponte* decision to send the case back for further state proceedings that could resolve the pertinent factual disputes was that the **federal district court** had failed to hold the very evidentiary hearing that Mr. Sankofa had timely and vigorously requested.

Second, the Fifth Circuit had to decide that Congress "expressly prescribed" that AEDPA would govern cases such as this, notwithstanding any retroactive effects that its application would cause. *Landgraf v. USI Film Products*, 511 U.S. 244, 280 (1994). In the absence of an

express prescription and in the face of retroactive effects, *Landgraf*'s judicial "default" rule forbidding retroactive application would govern. Disagreeing with the Third, Sixth, and D.C. Circuits while finding support in the Second (and indirectly in the Eighth and Tenth) Circuits, the Fifth Circuit answered the express-prescription question in the affirmative, saying – with no discussion of the statutory language or structure – that "[i]t appears to us that, on its face, AEDPA applies to Graham's application." 168 F.3d at 775; see also *id.* at 782-783.

Third, the Fifth Circuit had to decide, in the alternative, that "even if Congress's intent on this score is not clear, § 2244(b) [does] not [have] impermissibly retroactive" effects. *Id.* at 782. To reach this conclusion, the court had to craft a formula that requires more than *Landgraf*'s generally applicable definition of retroactive effects, plainly satisfied here by the "new" and devastating "legal consequences" which AEDPA's revision of § 2244(b) would attach to the pre-AEDPA "events" surrounding Mr. Sankofa's 1988 and 1993 habeas petitions. Again in conflict with decisions of the Third, Sixth and D.C. Circuits, the Fifth Circuit devised such a formula by (a) coining a novel standard of retroactivity that requires proof of "reasonable detrimental reliance," and then (b) defining the kind of reliance that is "reasonable" in a manner that departs so substantially from the established rules of pre-AEDPA habeas law as to call for this Court's supervision under *Lonchar v. Thomas*, 517 U.S. 314 (1996), and Supreme Court Rule 10(a). Mr. Sankofa's Third Question Presented subsumes both the Fifth Circuit's result-oriented substitution of its own test for the Court's *Landgraf* test of retroactive effects and its rewrite of preexisting habeas law in the process of finding Mr. Sankofa's reliance upon that law unreasonable.

Fourth, having determined that AEDPA applied to Mr. Sankofa's refiling of his petition

in December 1998 and transformed the Court of appeals' 1996 decision from a procedural ruling aimed at improving the quality of adjudication of Mr. Sankofa's 1993 petition into a terminal foreclosure of **any** adjudication of the merits of his constitutional contentions, the Fifth Circuit then had to decide that it lacked the power to recall its 1996 mandate to avoid such a perverse result. To do this, the court read *Calderon v. Thompson*, 523 U.S. 538 (1998) – which limited motions to recall a mandate in habeas cases "on the basis of **the merits of the underlying decision**" – as if it likewise forbade motions to recall the mandate issued on a decision **declining** to reach the merits. Doing so rendered the court powerless to recall the mandate of its1996 decision in order to keep the aim of that decision from being frustrated and from being turned into a death trap by accreting consequences the court in 1996 did not anticipate at all (or give the parties an opportunity to anticipate), let alone endorse on the merits.

Fifth, the Fifth Circuit had to decide that it could act in this fundamentally unfair way without violating Due Process. So it held. *See* 168 F.3d at 788-789.

We discuss in turn below the reasons why each of these five erroneous conclusions warrants the Court's review.

1. The Fifth Circuit's holding that the refiling of Mr. Sankofa's pre-AEDPA petition amounted to the filing of a new federal habeas proceeding, to which AEDPA applies, flouts this Court's reasoning in *Stewart v. Martinez-Villareal.*

In *Stewart v. Martinez-Villareal*, 523 U.S. 637, 118 S.Ct. 1618 (1998), the capital habeas petitioner filed a federal habeas petition in March 1993.[12] The district court dismissed his claim

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[12]This petition was actually the fourth federal petition filed by Martinez-Villareal, but the prior petitions had all been dismissed for lack of exhaustion. Accordingly, the March, 1993 petition was still considered the first petition. *See Rose v. Lundy*, 455 U.S. 509, 520-522 (1982).

that he was incompetent to be executed under *Ford v. Wainwright*, 477 U.S. 399 (1986), as premature (because the petitioner had no pending execution date), but granted relief on other grounds. The Ninth Circuit reversed the grant of relief "but explained that its instruction to enter judgment denying the petition was not intended to affect any later litigation of the *Ford* claim." 118 S.Ct. at 1620. Thereafter, an execution date was set; the petitioner exhausted state remedies on his *Ford* claim; and he returned to federal court. By this time, AEDPA had been enacted. The district court treated the refiling of the *Ford* claim as the filing of a "second or successive" habeas petition, applied AEDPA, and dismissed the petition because AEDPA forbids the filing of successive petitions without prior leave of a Court of appeals. The Ninth Circuit disagreed and remanded to the District court on the ground that § 2244(b) as amended by AEDPA does not apply to a petition raising only a *Ford* claim and, thus, Martinez-Villareal did not need the Court of appeals' permission to proceed.

This Court in turn concluded that the Ninth Circuit's decision was right, not because § 2244(b) does not in principle apply to *Ford* claims, but because under the circumstances of the Martinez-Villareal case the petition presenting his *Ford* claim was not a "second or successive application" for a writ of habeas corpus within § 2244(b) The Court's analysis of why the *Ford* petition was not a new and thus successive application teaches much about the relationship between a petition that is dismissed without an adjudication on the merits and a subsequent petition re-raising the same claims.

The Court analogized the dismissal of a claim because it is premature to the dismissal of a claim because it has not been exhausted. 118 S.Ct. at 1622. "[I]n both situations, the habeas petitioner does not receive an adjudication of his claim." *Id.* In both situations, the Court found,

the petitioner is entitled to return to federal court, following the removal of the procedural reason that prompted dismissal, and obtain a ruling on the merits of his or her claim. The reason for this result is that **the second petition is not a separate, distinct habeas application, but is a continuation of the first**. As the Court explained,

> This may have been the second time that respondent had asked the federal courts to provide relief on his *Ford* claim, but **this does not mean that there were two separate applications**, the second of which was necessarily subject to § 2244(b). **There was only one application for habeas relief**, and the District Court ruled (or should have ruled) on each claim at the time it became ripe. Respondent was entitled to an adjudication of all of the claims presented in his earlier, undoubtedly reviewable, application for federal habeas relief. (118 S.Ct. at 1621 (emphasis supplied).)

This analysis applies just as clearly to Mr. Sankofa's situation. The refiling in 1998 of his 1993 claims which had been dismissed without an adjudication on the merits – and explicitly "without prejudice" to such an adjudication – in order to permit further exhaustion of state remedies, may have been "the second time that [Mr. Sankofa] had asked the federal courts to provide relief on his ... [successive ineffective-assistance] claim, but this does not mean that there were two separate applications...." *Id.* "There was only one application for habeas relief...." *Id.* As in *Martinez-Villareal*, the "one application for habeas relief" must necessarily be the initial one raising the claim as to which adjudication was postponed until state-court action ripened it.[13]

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[13]The question in *Martinez-Villareal* was whether the filing, followed by a "post-ripeness" refiling, of the prisoner's first petition raising a *Ford* claim amounted to the filing of two petitions. The question here is whether the filing, followed by a post-ripeness refiling, of a first successive petition amounts to the filing of two distinct successive petitions. Although on its face *Martinez-Villareal* is a case about *counting* petitions, what it says about counting is equally applicable to analyzing the *dating* of petitions (no matter whether they are first or successive petitions) over time. For if the **second** filing of a petition raising a claim that was previously dismissed without adjudication amounts to filing only **one** application for habeas relief on that claim, then the **second** filing of a successive petition that was previously dismissed

Because under these principles, Mr. Sankofa's 1998 habeas petition was the same application as, and simply continued, his 1993, pre-AEDPA application, AEDPA could not properly be applied to it. As the Court held in *Lindh v. Murphy*, 521 U.S. 320 (1997), "the new provisions [effected by AEDPA] of chapter 153 [28 U.S.C. §§ 2241-2255] apply only to cases filed after the Act became effective" and not to "case[s] pending when the Act took effect." *Id.* at 336. If the filing of a post-AEDPA petition is the resumption of a petition filed before AEDPA – and not a "separate application," *Martinez-Villareal*, 118 S.Ct. at 1621 – the post-AEDPA petition cannot be fairly characterized as a "case[] filed after the Act became effective." *Lindh*, 521 U.S. at 336.

The Fifth Circuit rejected the plain language of *Martinez-Villareal*, saying:

> [T]he Court [in *Martinez-Villareal*] held simply that a habeas claim that has not been adjudicated on the merits is not 'successive' under AEDPA even if it has been brought before the courts before and dismissed on procedural grounds. Both where a claim is dismissed as premature and for failure to exhaust state remedies, 'the habeas petitioner does not receive an adjudication of his claim. To hold otherwise would mean that a dismissal of a first habeas petition for technical procedural reasons would bar the prisoner from ever obtaining federal habeas review.' [118 S.Ct. at 1622.] The Court's conclusion provides no indication that the dismissed application should be treated as a continuation of the first so as to preclude the application of AEDPA. (168 F.3d at 776-777.)

This parsing of *Martinez-Villareal*, especially the last sentence quoted, is incomprehensible. The reason explicitly stated in *Martinez-Villareal* for holding that the refiling of a petition previously dismissed without adjudicating the merits does not amount to the filing of a successive application is that the refiled petition and the previous petition are not "two separate applications" but "only one application for habeas relief" – namely the one initially filed but not

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without adjudication amounts to filing only **one** successive application -- and that is necessarily the earlier, pre-AEDPA application.

adjudicated because unripe. 118 S.Ct. at 1621. Failing to discern the rationale of *Martinez-Villareal*, the Fifth Circuit disregarded *Martinez-Villareal*'s straightforward application to Mr. Sankofa's case.

The Fifth Circuit found support for its reductionist reading of *Martinez-Villareal* in two additional arguments. First, it noted that "the Court applied AEDPA in reaching its result" in *Martinez-Villareal*, thus suggesting that this Court rejected the reading that Mr. Sankofa gives to its decision. 168 F.3d at 777. This is not correct. The holding of *Martinez-Villareal* was that § 2244(b), the only AEDPA provision whose application the state sought and the petitioner opposed, did **not** apply to the case. It is of no consequence that there may have been additional reasons for the same conclusion, reasons outside the certiorari questions presented and the arguments made to this Court, for example that under *Lindh*, Martinez-Villareal's single habeas application was not a "case[] filed after the Act became effective," *Lindh*, 521 U.S. at 336. What is consequential here is that the Court's own explanation for rejecting § 2244(b)'s application – that Mr. Martinez-Villareal's pre-AEDPA petition for *Ford* relief, which was dismissed without prejudice as unripe, and his post-AEDPA petition, were the same **one** federal habeas corpus application – establishes beyond reasonable cavil, when combined with *Lindh*, that AEDPA does not apply to a case like Mr. Sankofa's.

Second, the Fifth Circuit said that Mr. Sankofa's reading of *Martinez-Villareal* "would eviscerate the AEDPA limitation period and thwart one of AEDPA's principal purposes," 168 F.3d at 780, by "allow[ing] a prisoner to avoid AEDPA (and, *inter alia*, its statute of limitations) for many years after the passage of the statute." *Id.* at 779 (parenthetical in original text). The Sixth Circuit recently addressed and rejected this concern in a similar context in *In re Hanserd*,

123 F.3d 922 (6th Cir. 1997). After deciding that a petitioner who filed his first petition before AEDPA and his successive petition after AEDPA could not fairly be governed by AEDPA's successive-petition standards – which would otherwise have precluded consideration of the successive petition – the Court explained,

> Nor is allowing inmates in Hanserd's position to move for relief under § 2255 incompatible with Congress's intent in enacting AEDPA. The AEDPA is in large part intended to prevent state and federal inmates from continuing to flood the federal courts with challenges to their confinement and to put a stop to what many see as the use of multiple federal habeas corpus petitions to delay the execution of those sentenced to death. Our holding means that federal inmates will have one post-AEDPA bite at the apple, limited further, for prisoners who filed a § 2255 motion before AEDPA's enactment, by the old abuse-of-the-writ standard. One motion per federal prisoner with a colorable *Bailey* [*v. United States*, 516 U.S. 137 (1995)] claim is hardly a flood, and offers little opportunity for delay. (*Id.* at 933.)

That some prisoners will be given a period of litigation sufficient to allow them one adjudication on the merits of claims originally filed before AEDPA, inconclusively resolved, and therefore refiled after AEDPA, does not answer the question whether this is appropriate in light of AEDPA's purposes. Obviously, it is permissible in some circumstances, as the ruling in *Martinez-Villareal* itself demonstrates. To the extent that the Fifth Circuit was implying that petitioners like Mr. Sankofa might be encouraged to abuse the writ ("allow[ing] a prisoner to avoid AEDPA ... for many years," *Graham*, 168 F.3d at 780), such a concern is baseless, because the crucial circumstance that removes prisoners like Mr. Sankofa from AEDPA's regime is an action that they took **before** AEDPA was enacted – here, the filing of a 1993 petition raising the very same claim that remains in issue today – at a time when the prisoner would have had to be clairvoyant to seize a then-unrecognizable opportunity to "abuse" the writ. Moreover, the limited, temporary removal of some of these prisoners' successive claims from regulation by

AEDPA does not leave them unrestrained; it simply leaves them subject to the Court's less preclusive, but nonetheless highly preclusive, *McCleskey* rule.

2. Even if Mr. Sankofa's refiling of his 1993 petition in 1998 amounted to the filing of a post-AEDPA petition, the Fifth Circuit's determination that Congress intended the new § 2244(b) provisions to apply to such a petition (a) disregards the requirement that Congress express such an intent unambiguously, and (b) conflicts with the decisions of the Third, Sixth, and D.C. Circuits on this same important matter.

Concluding that Mr. Sankofa's 1998, post-exhaustion refiling of his 1993 petition counts as a 1998, not a 1993, petition was only the first of several steps the Fifth Circuit had to take to justify applying new § 2244(b)'s absolute ban on same-claim successive petitions instead of the *McCleskey/Schlup* "actual innocence" test. The next step was to conclude that Congress intended AEDPA to govern such cases, even when it would have a retroactive effect. That question is controlled by the plain-statement rule of *Landgraf v. USI Film Products*, 511 U.S. 244, 280 (1994), which says that unless Congress "has **expressly prescribed** the statute's proper reach," *id.* (emphasis supplied), the ordinary judicial "default" rules (discussed in Part 3 below) must be used to determine the applicability of AEDPA to petitions like Mr. Sankofa's.

On the face of it, the Fifth Circuit's explanation for finding the *Landgraf* plain-statement rule satisfied is insufficient, namely, that "it appears to us that Congress fully intended that AEDPA govern applications such as Graham's." 168 F.3d at 782. The rationale for this conclusion was set out earlier in the Court's opinion:

> It appears to us that, on its face, AEDPA applies to Graham's application. The statute was enacted on April 24, 1996, and Graham did not file his current federal habeas application until November 18, 1998.[14] In *Lindh v. Murphy*, 521 U.S.

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[14]Actually, the petition was filed **December** 18, 1998.

> 320, 336, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997), the Supreme Court held that 'the new provisions of chapter 153 [the chapter of Title 28 of the United States Code containing § 2244 and §§ 2253-2255] generally apply only to cases filed after the Act became effective.' We are comforted in our conclusion by the fact that, in *Felker v. Turpin*, 518 U.S. 651, 655-58, 665, 116 S.Ct. 2333, 135 L.Ed.2d 827 (1996), the Court applied AEDPA to a successive application filed after April 24, 1996 where the first application was filed before that date. It seems equally apparent that § 2244(b)'s restrictions on second or successive habeas applications govern Graham's current application, which he concedes is second or successive within the meaning of the statute. (168 F.3d at 775.)

This reasoning, as a basis for determining that Congress has prescribed the temporal reach of AEDPA's successive-petition rules, is altogether wrong. Nothing in the text or legislative history of AEDPA suggests that Congress even considered the question. Nor does the Fifth Circuit make any effort to discern what Congress might have intended had it realized the effects that retroactive application of AEDPA's new successive-petition standards could have upon petitioners who litigated their first petitions before AEDPA.

The reason the Fifth Circuit pointed to nothing in the text or legislative history of AEDPA to support its view that "Congress fully intended that AEDPA govern applications such as Graham's," is that there **is** nothing. The only occasions on which "this Court has found truly 'retroactive' effect adequately authorized by a statute have involved statutory language that was so clear that it could sustain only one interpretation." *Lindh*, 521 U.S. at 328 n.4. The Fifth Circuit's failure to point to such language, and the absence of any such language in AEDPA, means that there is no support for the Fifth Circuit's conclusion.

The Fifth Circuit's substitute reasoning is equally unsupported. Though *Felker* did consider the application of AEDPA to the post-AEDPA successive petition there, the Court left open whether AEDPA applied to its original jurisdiction. 518 U.S. at 663. Moreover, Felker's

successive petition failed to meet the criteria for prosecuting successive petitions under *McCleskey* as well as AEDPA. *Id.* at 658. Thus, there was no need for the Court to decide the issue presented by Mr. Sankofa's case, where the petitioner would be able to prosecute his successive petition under pre-AEDPA standards but not under post-AEDPA standards. For that reason, "[t]he Court in *Felker* did not purport to decide whether the [AEDPA's successive-petition] gatekeeping restrictions should be applied to cases arising before AEDPA's enactment...." *In re Hanserd*, 123 F.3d at 933. The Fifth Circuit has stretched *Felker* beyond recognition.

There is a further reason to grant certiorari on this issue. The Third, Sixth, and D.C. Circuits disagree with the Fifth Circuit regarding Congress' expressed intent on this question. As the Fifth Circuit acknowledged in *Graham*, 168 F.3d at 782, the Third and D.C. Circuits have followed the lead of the Sixth Circuit in holding that Congress gave no guidance as to whether AEDPA's successive-petition restrictions were intended to apply to cases in which the first petition had been filed prior to AEDPA. As the Sixth Circuit explained in *In re Hanserd*,

> This case presents us primarily with the question of whether AEDPA's new restriction on filing multiple § 2255 motions 'is the type of provision that should govern cases arising before its enactment.' *Landgraf v. USI Film Prods.*, 511 U.S. 244, 280, 114 S.Ct. 1483, 1504, 128 L.Ed.2d 229 (1994). Because Congress has not expressed any clear intent as to the answer to this question, we must resort to *Landgraf*'s default rules to decide the question. (123 F.3d at 924.)

The Third and D.C. Circuits agree. *See In re Minarik*, 166 F.3d 591, 599 (3d Cir.1999) ("[b]ased on our reading of *Landgraf* and *Lindh*, we join two other courts of appeals in holding that AEDPA contains no unambiguous guidance regarding retroactive application of AEDPA's new 'second or successive' petition standards and procedures to cases in which the first habeas petition was filed before AEDPA's enactment"); *United States v. Ortiz*, 136 F.3d 161, 165

(D.C.Cir.1998) ("Congress did not expressly indicate whether the AEDPA amendments to the procedures and standards for filing second § 2255 motions are to be applied in cases where the first § 2255 motion was filed before the enactment of AEDPA").

Because this aspect of the Fifth Circuit's ruling in Mr. Sankofa's case, if correct, is a sufficient basis for the Fifth Circuit's decision, and because Mr. Sankofa would not have lost on this basis if his case were in the Third, Sixth, or D.C. Circuits, certiorari should be granted.

1. (A) The Fifth Circuit's conclusion that applying AEDPA's § 2244(b) has no retroactive effect in the absence of "reasonable detrimental reliance" conflicts with *Landgraf*'s quite different test for retroactive effects and with decisions of the Third, Sixth, and D.C. Circuits finding retroactive effects under *Landgraf* in cases like Mr. Sankofa's without requiring "detrimental reliance."

(B) Even if "reasonable detrimental reliance" were required, the Fifth Circuit's conclusion that Mr. Sankofa has not shown such reliance departs so far from settled principles of pre-AEDPA law as to call for the exercise of this Court's supervisory powers under *Lonchar v. Thomas*, 517 U.S. 314 (1996).

A. The Fifth Circuit's adoption of a "reasonable detrimental reliance" test for measuring retroactive effects

Recognizing the weakness of its "plain statement" conclusion, the Fifth Circuit held alternatively that under *Landgraf* s judicial default rules, the application of revised § 2244(b) was "not impermissibly retroactive." 168 F.3d at 782. The fulcrum of this holding is that to apply a change in law to pre-enactment incidents is not impermissibly retroactive unless the party who contends that it is can show that he or she reasonably and detrimentally relied on the previous version of the law. The Fifth Circuit thus foisted a spurious concept of "retroactive effect" onto the definition that this Court adopted, after exhaustive consideration, in *Landgraf*. Such a concept conflicts not only with *Landgraf* but with three other circuits' analyses of the question

whether the application of AEDPA's § 2244(b) to cases like Mr. Sankofa's has retroactive effects.

The Fifth Circuit acknowledged that *Landgraf*'s default rules preclude retroactive application of changes in the law where such application "'would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed.'" 168 F.3d at 781 (quoting *Landgraf*, 511 U.S. at 280). What this principle meant to the Fifth Circuit, however, was that a successive habeas petitioner must show that he or she "relied on pre-AEDPA law in filing a previous application," 168 F.3d at 784:

> A number of our fellow courts of appeals, following the high Court's guidance, have analyzed this issue in terms of whether AEDPA bars the successive habeas application of a prisoner who relied on pre-AEDPA law in filing a previous application. We find this approach sensible and correct given that retroactivity is disfavored precisely because it upsets settled expectations; if a litigant in no way relies on existing law, then a change in that law cannot fairly be said to harm him. (*Id.* at 783-784.)[15]

Citing *Pratt v. United States* (one of the fellow-circuit decisions collected in note 15 *supra*), 129 F.3d at 59, the Fifth Circuit added that "even when a prisoner subjectively relies to his detriment on pre-AEDPA law, he is exempt from the new statute only if his reliance was reasonable."

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[15]The Fifth Circuit noted that the following circuits are in agreement with it on this question: the **First**, citing *Pratt v. United States*, 129 F.3d 54, 59 (1st Cir. 1997), *cert. denied*, ___ U.S. ___, 118 S.Ct. 1807 (1998) (habeas petitioner must "show that he consciously chose to withhold a potential ground for relief from his first petition because he detrimentally relied upon pre-AEDPA law"); the **Seventh**, citing *Alexander v. United States*, 121 F.3d 312 (7th Cir. 1997) ("Alexander has not furnished any evidence that, when omitting issues from his first collateral attack, [begun] in 1995, Alexander relied on a plausible belief that the approach then governing – the 'abuse of the writ' doctrine detailed in *McCleskey v. Zant*, 499 U.S. 467 (1991) – would have permitted a successive collateral attack"); and the **Eleventh**, citing *In re Magwood*, 113 F.3d 1544, 1552 (11th Cir. 1997) ("[t]he present case, however, is distinguishable ... because Petitioner has not relied to his detriment on pre-AEDPA law").

Applying this notion to Mr. Sankofa's case, the Fifth Circuit determined that the relevant petition to consider in connection with the issue of possible detrimental reliance was Mr. Sankofa's first petition, filed in 1988, because it is "the 1988 application, not the 1993 application, that makes Graham's current application successive and potentially subject to § 2244(b)." 168 F.3d at 786. The court quickly concluded that "Graham has not alleged detrimental reliance on pre-AEDPA law in 1988, and he cannot even plausibly claim that he might have acted differently had he known that AEDPA later would bar his claims." *Id.* The court reasoned that:

> Even under pre-AEDPA law, a prisoner was required to present all his claims in his first application, *see McCleskey*, 499 U.S. at 494-95 (holding that a prisoner wishing to bring a new claim in a second or successive habeas application had to show either that the application did not constitute an 'abuse of the writ' or that he had made 'a colorable showing of innocence'), and it would not have been reasonable for Graham consciously to hold back claims that he has conceded ... he could have included in the 1988 application. Thus, ... Graham defied pre-AEDPA law by neglecting to include claims and evidence that he could have discovered in 1988 in his first application. Accordingly, AEDPA is not retroactive with respect to Graham's 1988 application under any detrimental reliance approach. (*Id.*)

In adopting a "detrimental reliance" test for retroactive effects, the Fifth Circuit – along with the First, Seventh, and Eleventh Circuits – departed from *Landgraf*'s own reasoning. After a comprehensive effort to distill the prior case law into a set of rules for future cases, the Court held in *Landgraf* that the test of whether a new statute has retroactive effects is "whether the new provision attaches new legal consequences to events completed before its enactment." 511 U.S. at 270. This definition was based upon scores of cases going back to the 18th Century and marks the contours of what the Court has always held to be retroactive effects. 511 U.S. at 269-70 & n. 23 (citing numerous cases). *See Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 (1798). The Court was

at pains to enumerate a wide range of ways in which a "new legal consequence" may be found, never once suggesting that "detrimental reliance" on previous law is a necessary part of the test. Thus, among the kinds of statutory provisions that it said have "retroactive effects" are those that:

(1) "affect[] substantive rights," 511 U.S. at 278,

(2) "impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed," *id.* at 280,

(3) "sweep away settled expectations suddenly and without individualized consideration," *id.* at 266,

(4) "'change[ ] the legal consequences of acts completed before [the new law's] effective date,'" *id.* at 269 n. 23,

(5) "give[] 'a quality or effect to acts or conduct which they did not have or did not contemplate when they were performed,'" *id.*,

(6) "impos[e] new burdens on persons after the fact," *id.* at 270, or

(7) may be "retributive," *id.* at 282.

This is wholly consistent with the precedents. As the Court noted in a footnote in *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976), only "one line of cases" – comprised of three decisions, the latest decided 58 years ago – treats reliance as a "significant" factor. *Id.* at 18 n.16. Moreover, *Usery* and two of the cases it cites are part of a much longer and more distinguished line of decisions – all of them taken by *Landgraf* as authoritative – in which courts have found retroactive effects despite the clear absence of reliance interests affected by the new statute.[16]

Concededly, the Fifth Circuit is only one of four that have ignored this aspect of

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[16]Because the decisions in which the courts have found retroactive effects despite the clear **absence** of reliance interests affected by a new statute are so numerous, we have collected some in Appendix 8 to illustrate our point further.

Landgraf and its forerunners. But three other circuits have read *Landgraf* more carefully. The Third, Sixth, and D.C. Circuits have all rejected the detrimental-reliance approach espoused by the First, Fifth, Seventh, and Eleventh, and have done so specifically in the successive-habeas-petition context. *See In re Hanserd*, 123 F.3d 922 (6th Cir. 1997); *In re Minarik*, 166 F.3d 591, 599 (3d Cir.1999); and *United States v. Ortiz*, 136 F.3d 161, 165 (D.C.Cir.1998).[17] In each of these cases, the petitioner had filed a pre-AEDPA 2254 petition or 2255 motion and sought to file a successive 2254 petition or 2255 motion after AEDPA's enactment. In each case, the court ruled that the operative test for determining whether the application of AEDPA's successive-petition rules would be impermissibly retroactive was whether the petitioner would have been allowed to file a successive petition under pre-AEDPA law. If the petitioner could have filed a successive petition under the pre-AEDPA criteria but would be precluded from filing it under the AEDPA criteria, then the application of AEDPA would be impermissibly retroactive. No showing of detrimental reliance is required. As the court explained in *Hanserd*, 123 F.3d at 931:

> When Hanserd filed his initial § 2255 motion, the law would have allowed him to raise a *Bailey* claim in a second motion....[18] Under AEDPA, however, he may not.[19] Applying the new statute would thus attach a severe new legal

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[17]Acknowledging this circuit split, the Seventh Circuit described it as "well established" and noted that "[t]he Supreme Court will have to resolve the conflict." *In re Davenport*, 147 F.3d 605, 608 (7th Cir. 1998). The Fifth Circuit acknowledged the split as well in *Graham*. 168 F.3d at 785 & n.17.

[18] Hanserd would have been able to show cause and prejudice under *McCleskey*. *See Hanserd*, 123 F.3d at 928-929.

[19] Hanserd's claim was neither based upon a new rule of constitutional law, 28 U.S.C. § 2255 (second (2)) – which is the counterpart to § 2244(b)(2)(A) for § 2254 cases – nor upon newly discovered evidence, 28 U.S.C. § 2255 (second (1)) -- which is the counterpart to § 2244(b)(2)(B)(i) for § 2254 cases. 123 F.3d at 929.

> consequence to his filing a first motion: he would have lost his right to challenge his sentence.... *See Landgraf*, 511 U.S. at 280.... Because Congress has not expressed an intent that the new Act have such a retroactive effect, we could not apply AEDPA in this way. (Citations and footnote omitted.)

The Third Circuit reasoned similarly in *Minarik*, 166 F.3d at 600 –

> [i]n those cases where a prisoner in state custody had a right to prosecute a second or successive petition prior to AEDPA's passage, but would be deprived of that right by ... [§ 2244(b)'s] new gatekeeping provisions, we conclude that applying the AEDPA standard would have a 'genuine retroactive effect' because it would attach a new and adverse consequence to pre-AEDPA conduct – the prosecution of the original proceeding

– as did the D.C. Circuit in *Ortiz*, 136 F.3d at 166 –

> the new standards and procedures under AEDPA for filing § 2255 motions could only be improperly retroactive as applied to Ortiz if he would have met the former cause-and- prejudice standard under *McCleskey* and previously would have been allowed to file a second § 2255 motion, but could not file a second motion under AEDPA.[20]

This approach to retroactive effects – turning on the visitation of new, more harmful consequences rather than on "detrimental reliance" – is especially appropriate in connection with capital habeas corpus proceedings. The pre-AEDPA rules which permitted the filing of a second or successive petition upon a showing of cause-and-prejudice **or** of actual innocence developed in this context. Where claims or facts supporting previously-raised claims were omitted from a

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[20] Under these circuits' analyses, if the petitioner would not have met the *McCleskey* requirements for prosecuting a successive petition, "these courts have concluded that there is no genuine retroactive effect and the AEDPA standard may be applied." *Minarik*, 166 F.3d at 601. *See also Hanserd*, 123 F.3d at 932 ("[w]here the old and the new law lead to an identical result, there is no need to conduct a retroactivity analysis because the new law has not attached any new consequences to pre-enactment conduct or upset settled expectations"); *Ortiz*, 136 F.3d at 167 (applying AEDPA's new standard to deny the petitioner's second § 2255 motion produced no impermissible retroactive effect because petitioner "failed to meet the requirements of the former 'abuse of writ' standard of *McCleskey*, and the new AEDPA standards").

first petition and there was insufficient "cause" for it, a showing of actual innocence would nonetheless suffice to authorize the hearing of a successive petition on the merits. In this way, the "quintessential miscarriage of justice ... [*i.e.*,] the execution of a person who is entirely innocent," *Schlup v. Delo*, 513 U.S. 298, 324-325 (1995), could be avoided. Such a rule was a necessary part of the fabric of pre-AEDPA habeas law, for this was a period of time – prior the decision in *McFarland v. Scott*, 512 U.S. 849 (1994) – when most capital habeas petitioners were represented by *pro bono* counsel whose only investigative resources were provided out of their own pockets. Issues and critical factual matters were sometimes missed, not intentionally but inadvertently, under those circumstances. There needed to be a failsafe mechanism to allow for the presentation of claims by actually innocent people, whenever that evidence was discovered, and regardless of whether it should have been discovered earlier. The *McCleskey/Schlup* successive-petition rule provided that mechanism.

In this context, there will rarely be a showing of "reasonable detrimental reliance" upon the successive-petition principles articulated by *McCleskey*. Counsel usually did the best they could do, but sometimes they missed vitally significant issues and facts in first petitions. They did not miss or omit them in specific reliance on the successive-petition rules. However, the existence of those rules allowed some recourse if truly significant facts or claims surfaced later which counsel had missed in connection with the first petition. It is this failsafe mechanism – which was woven into federal habeas law in 1988 when Mr. Sankofa's first petition was filed and in 1993 when his successive petition was filed – which AEDPA later stripped away.

Had Mr. Sankofa's case arisen in the Third, Sixth, or D.C. Circuits, he would not be here now. These circuits would have determined that because AEDPA threatened to attach new legal

consequences to the filing of his first, 1988, petition, it could not be applied retroactively to bar his second successive petition. The Court should grant certiorari to correct this geographic quirk.

B. The Fifth Circuit's application of the "reasonable detrimental reliance" test to Mr. Sankofa's case

Mr. Sankofa argued in the Fifth Circuit that if detrimental reliance **were** relevant to the issue of the retroactivity of § 2244(b), it should be found in his circumstances. He pointed out that when he decided not to go back to the state courts with another state habeas petition in 1993 after discovering from the long-hidden police report still further evidence supporting his claims of innocence and trial counsel's ineffectiveness, he reasonably relied on the then-existing framework of exhaustion law and successive-petition law. He believed that the rules of exhaustion did not require repeated returns to the state courts to present later-discovered evidence of the same basic claims when those claims had already been strong at the time the state courts rejected them. *See Vasquez v. Hillery*, 474 U.S. 254, 260 (1986) ("the supplemental evidence presented by [the prisoner] did not fundamentally alter the legal claim already considered by the state courts..."). The extant Fifth Circuit law supported this belief. *See Hart v. Estelle*, 634 F.2d 987, 989 (5th Cir. 1981) (new facts in support of claims first presented in federal habeas proceeding require re-exhaustion only if they turn a "weak" case in state court into a "strong" case in federal court); *Joyner v. King*, 786 F.2d 1317, 1319-20 (5th Cir.), *cert. denied*, 479 U.S. 1010 (1986) (same); *Brown v. Estelle*, 701 F.2d 494, 495-496 (5th Cir. 1983) (same). And Mr. Sankofa also believed that if a federal court **did** conclude that he should be required to undertake another round of exhaustion litigation in the state courts, he could then return to federal court in no worse position relative to the applicable successive-petition rules than he was in to start with:

that is, he would have to meet the actual-innocence requirements of *Kuhlmann* and *McCleskey*, just as he had to do in filing his successive petition in 1993.

The Fifth Circuit responded to this argument by holding that Mr. Sankofa's reliance was not reasonable:

> [H]e had no right to place any reliance on the filing of an unexhausted application. Under *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 5-12 (1992), he was required to present his new evidence to the state courts before bringing it to federal court. Although the state waived the exhaustion requirement, it did so after Graham decided to file his unexhausted application and could have played no role in his initial decision to file. Thus, Graham's reliance argument boils down to this: He deliberately flouted federal law by filing an unexhausted application, expecting that if it were dismissed without prejudice, he could return to state court and then, perhaps, to federal court under the same law that had been in effect when he filed the unexhausted application. We find such reliance patently unreasonable. (168 F.3d at 786-787 (footnotes omitted).)

Tamayo-Reyes, of course, **began** its analysis from the premise that a material fact necessary to support Tamayo-Reyes' federal claim had **not** been developed in the state courts as a result of his lawyer's negligence. *See* 504 U.S. at 4-5. The case thus presented no issue as to whether, after substantial evidence in support of a federal claim **has** been submitted to a state court and rejected by it, the discovery of additional evidence strengthening an already-strong claim requires re-submission to the state courts to satisfy the requirement of exhaustion of state remedies. *Tamayo-Reyes* did not examine the Fifth Circuit case law that **did** address this issue; nor did *Tamayo-Reyes* overrule, narrow, or even cite *Vasquez v. Hillery* – the only case decided by this Court that bears upon the issue. Moreover, the holding and the sole focus of *Tamayo-Reyes* was that a habeas petitioner's failure to develop a material fact in state-court proceedings constitutes a default **unless excused by a showing of cause and prejudice**. The cause-and-prejudice question never arose in Mr. Sankofa's 1993 proceeding. But if it had arisen, Mr.

Sankofa plainly could have shown cause, because his "failure" to present the later-discovered evidence to the state courts was the result of the Harris County District Attorney's resistance to Mr. Sankofa's open-records request for access to the district attorney's file.[21] *See Strickler v. Greene*, No. 98-5864, ___ U.S. ___ (June 17, 1999) (Memorandum Opinion, at 25) (cause is shown where the material document "'was not reasonably discoverable because it was concealed by [county] officials...,'" quoting *Amadeo v. Zant*, 486 U.S. 214, 222 (1988)). And Mr. Sankofa also could have shown prejudice **if** the after-discovered evidence had proved to be sufficiently important to the disposition of his federal claim to take his case out of the rule of the *Hart/Joyner/Brown* line of Fifth Circuit cases.

But suppose that the Fifth Circuit in 1999 was right that *Tamayo-Reyes* undid *Hillery* and the *Hart/Joyner/Brown* line of cases **and** imposed not only a requirement of cause-and-prejudice but an inflexible duty upon Mr. Sankofa to take his after-discovered evidence back to state court. Even that supposition would not justify the Fifth Circuit's characterizations of his failure to do so as "deliberately flout[ing] federal law" or as "unreasonable reliance" upon his own, different reading of the case law. Whatever else "reasonable reliance" may mean, it cannot mean "**correct** reliance"; for if it did, the concept would be moot as well as misnamed. When the Fifth Circuit taxed Mr. Sankofa with acting unreasonably in 1993, it plainly was not measuring his conduct by a standard that related to the rules of habeas corpus jurisprudence in effect at that time – the body of "complex procedural principles [developed by "Congress, the Rule writers, and the courts" to] . . . regularize and thereby narrow the discretion that individual judges can freely exercise," *Lon-*

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[21] Mr. Sankofa finally obtained the file through a Texas Attorney General's order.

char v. Thomas, 517 U.S. at 322, "[e]ven in the context of 'second and successive petitions,'" where "this Court has created careful rules for dismissal of petitions for abuse of the writ." *Id.* at 324. The Fifth Circuit was, instead, holding Mr. Sankofa to a standard of its own devising, *ad hoc* as well as *post hoc*. Very much like *Lonchar*, then, this is a case within this Court's Rule 10(a), where a United States court of appeals "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power."

4. Having decided that AEDPA terminally barred Mr. Sankofa's 1998 petition, the Fifth Circuit wrongly refused to recall its mandate in Mr. Sankofa's 1993 habeas proceedings to avoid a miscarriage of justice; and it misread *Calderon v. Thompson*, 523 U.S. 538 (1998), as requiring the courts of appeals to treat every post-AEDPA motion by a habeas petitioner to recall a pre-AEDPA mandate as a second or successive petition for purposes of § 2244(b).

As an alternative to recognizing that Mr. Sankofa's 1998 petition was not barred by AEDPA, Mr. Sankofa asked the Court of appeals below to recall the mandate in its 1996 decision on appeal from the denial of his **1993** petition and to amend that decision to:

> permit Mr. Sankofa to reopen the habeas [petition] he filed July 22, 1993, upon the [further] exhaustion of state remedies [ordered in 1996], and upon reopening to retain the benefit of the 1993 case number and original filing date,

or in the alternative, to

> amend the mandate to remand the 1993 petition to the District Court for an evidentiary hearing on the merits of Mr. Sankofa's ineffective assistance and innocence claims, based upon the State's express and adamant waiver of exhaustion and the recognition that the State's new successive habeas application rules preclude review and resolution of the merits of Mr. Sankofa's claims.

(Brief on Appeal from District Court's Dismissal of Habeas Petition and Alternative Motion to Recall Mandate in Previous Habeas Appeal, filed January 9, 1999, No. 99-20014 (5th Cir.), at 22.) Mr. Sankofa relied on *Calderon v. Thompson*, 523 U.S. 538, 118 S.Ct. 1489, 1498 (1998),

in support of this request, and the Fifth Circuit explicated *Thompson* in denying it:

> *Thompson* held that if a court of appeals recalls a pre-AEDPA mandate as a result of a post-AEDPA motion, AEDPA applies to the motion, although this is not true if the court recalls its mandate of its own accord. *See id.* at 1499-1500. Our consideration of Graham's argument is, quite obviously, not a *sua sponte* decision but a response to his request that we do so. AEDPA therefore applies to Graham's Motion to Recall Mandate in Previous Habeas Case; because he concedes ... that he cannot meet AEDPA's substantive requirements, we must deny that motion. (168 F.3d at 789.)

Certiorari should be granted to review this aspect of the decision below because the Fifth Circuit's exegesis of *Thompson* misreads the holding of that case and ignores the equities that *Thompson* identified as warranting the recall of an appellate mandate.

AEDPA played a role in *Thompson* because the Court there was concerned that motions to recall appellate mandates in pre-AEDPA habeas appeals might be used by prisoners to "evade . . . [AEDPA's] bar against relitigation of claims presented in a prior application, § 2244(b)(1), or the bar against litigation of claims not presented in a prior application, § 2244(b)(2)." 118 S.Ct. at 1500. Thus, the Court laid down two complementary principles. The first distinguishes between the recall of a mandate *sua sponte* and the recall of a mandate at the instance of a habeas petitioner. If a court of appeals acts on "a prisoner's motion to recall the mandate on the basis of the merits of the underlying decision," *id.*, "its action is subject to AEDPA irrespective of whether the motion is based on old claims . . . or new claims. . . ." *Id.* Second, "[i]f, in recalling the mandate, the court considers new claims or evidence presented in a successive application for habeas relief, it is proper to regard the court's action as based on that application." *Id.*

Mr. Sankofa's motion to recall the Fifth Circuit's mandate neither affronted these principles nor implicated the concern that gave rise to them. Far from asking the Court of

appeals to modify its prior decision "on the basis of the merits of the underlying decision." Mr. Sankofa asked it to recall its mandate in order to **effectuate** the prior decision and prevent its frustration through "grave, unforeseen contingencies," *Thompson*, 118 S.Ct. at 1498. In its 1996 decision in *Graham v. Johnson*, 94 F.3d 958, the Fifth Circuit ordered Mr. Sankofa to present his claims one more time to the state courts in order to give those courts another opportunity to resolve the factual disputes that had to be resolved as the precondition for making a fair determination of Mr. Sankofa's claims on the merits. As the court explained:

> The issues in this case are almost exclusively factual, and the relevant factual scenario is complex, highly controverted, and in many respects unresolved. The district court denied the petition without an evidentiary hearing. There is a large body of relevant evidence that has not been presented to the state court. It is doubtful that the record before us allows review of the underlying issues on a fully informed basis. (*Id.* at 970-971.)

Thus, the court's purpose in requiring further exhaustion was to get the case into satisfactory shape to adjudicate on the merits "on a fully informed basis"; it was **not** to anticipate the merits before the "highly controverted" "factual scenario" in question was "[ ]resolved"; and it was certainly **not** to work a terminal foreclosure of any federal adjudication of the merits of Mr. Sankofa's claims of ineffective assistance of counsel and actual innocence.[22] Such a terminal

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[22] That the Fifth Circuit chose the state courts over the district court as the locus for an evidentiary hearing – and that it did so without explanation even though it indicated that the district court's failure to hold a hearing had left it with an inadequate record – makes sense *only* if the Fifth Circuit assumed that it was legally of no consequence to Mr. Sankofa whether the hearing took place in state court or federal court. Had the Fifth Circuit believed that its choice of the state forum would have the effect of turning Mr. Sankofa's right to an eventual federal adjudication into the converse, **an absolute bar to federal adjudication**, presumably the court would have explained why it was so important to choose the state courts to fill the void created by the district court's denial of a hearing and thus deprive Mr. Sankofa of the federal adjudication to which he was entitled on his 1993 petition.

foreclosure – the product of the subsequent application of AEDPA's amended § 2244(b) to the federal petition that Mr. Sankofa refiled in 1998 after completing the exhaustion ordered by the Fifth Circuit in 1996 – totally thwarted the objective of the Fifth Circuit's 1996 mandate.

Yet, when Mr. Sankofa moved to recall the mandate for this reason, the Fifth Circuit held that *Thompson* required it to deny such a motion – indeed, to deny **any** motion made by a habeas petitioner to recall the mandate in a prior habeas appeal – *eo ipso*, simply because the motion had been made. This ruling misconceives and misappropriates the teaching of *Thompson*. Since Mr. Sankofa's motion was not made "on the basis of **the merits of the underlying decision**," 118 S. Ct. at 1500 (emphasis supplied), and did not ask the Fifth Circuit to "consider[] claims or evidence presented in a successive application for habeas relief," *id.*, it was not the sort of motion that *Thompson* said should be subjected to AEDPA's preclusive successive-petition rules.

To the contrary, Mr. Sankofa's motion invoked precisely those equities that *Thompson* recognized as warranting the recall of a mandate. In an appropriate case – such as this one, where Mr. Sankofa is not seeking to relitigate claims previously decided on the merits but only to effectuate the aim of the earlier decision that he eventually receive a hearing on the merits of his claims – *Thompson* contemplates that an appellate court will "act[] to avoid a miscarriage of justice as defined by our habeas corpus jurisprudence." *Id.* at 1502. Since the miscarriage of justice standard "'is concerned with actual as opposed to legal innocence,'" *id.* (quoting *Sawyer v. Whitley*, 505 U.S. 333, 339 (1992)), "[i]f the petitioner asserts his actual innocence of the underlying crime, he must show 'it is more likely than not that no reasonable juror would have convicted him in light of the new evidence' presented in his habeas petition." *Id.* at 1503 (quoting *Schlup v. Delo*, 513 U.S. at 327). That is precisely what Mr. Sankofa is prepared to

show (*see* pages 6 - 10 *supra*); and the Fifth Circuit's reading of *Thompson* as a bar to such a showing is a gross inversion of *Thompson*'s explicit reasoning.

5. The Fifth Circuit's failure to recall its mandate in the circumstances of Mr. Sankofa's case deprived him of due process because it extinguished his right to an adjudication of the merits of his claims of ineffective assistance and actual innocence although he has done nothing to warrant their eradication.

In *Logan v Zimmerman Brush Co.*, 455 U.S. 422 (1982), the Court held that due process is violated when a cause of action is extinguished as a result of delays in the adjudicative process for which the adjudicator, not the claimant, is responsible. Quoting *Société Internationale v. Rogers*, 357 U.S. 197, 209 (1958), the Court explained: "[T]he 'property' component of the Fifth Amendment's Due Process Clause ... impose[s] 'constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause.'" 455 U.S. at 429. This is precisely what the Fifth Circuit did to Mr. Sankofa when it refused to recall its mandate.

Mr. Sankofa's case of ineffective assistance of counsel and actual innocence was dragged into the AEDPA era through no action or inaction of his own. In 1993, the federal district court denied his request for an evidentiary hearing that, three years later, the Fifth Circuit held was necessary to resolve his claims. The Fifth Circuit compounded the delay by deciding – without consulting the parties and in disregard of both parties' clearly expressed desire to proceed to the merits in federal court – that the evidentiary hearing should occur in the state courts. This decision was based upon the misguided speculation that there was an available state remedy – which, in fact, there was not. On his return to federal court, multiply exhausted, in 1998, Mr. Sankofa was met with the judgment that his pre-existing right to an evidentiary hearing and a

federal decision on the merits of his claims had been extinguished by AEDPA.

To be sure, the legislature retains the prerogative "to create substantive defenses or immunities for use in adjudication – or to eliminate its statutorily created causes of action altogether," *Logan*, 455 U.S. at 432, without violating due process – as Congress did here in enacting the AEDPA. *See Felker v. Turpin*, 518 U.S. at 664 ("judgments about the proper scope of the writ [of habeas corpus] are 'normally for Congress to make'"). However, courts do not have the prerogative to "deprive[] persons of their claims in a random manner," *id.* at 434; and when they do so – as was done to Mr. Sankofa here – the result offends due process. This Court should not countenance such a result, particularly when the claims that are extinguished go to show "[t]he quintessential miscarriage of justice[:] . . . the execution of a person who is entirely innocent." *Schlup v. Delo*, 513 U.S. at 324-325.

CONCLUSION

Certiorari should be granted and the decision of the Fifth Circuit should be reversed.

Respectfully submitted,

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